



INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1265]

Certain Fitness Devices, Streaming Components Thereof, and Systems Containing Same; Notice of Commission Determination to Review the Final Initial Determination in Part; Request for Written Submissions on the Issues Under Review and on Remedy, the Public Interest, and Bonding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the final initial determination (“Final ID”) issued by the presiding chief administrative law judge (“CALJ”) on September 9, 2022. The Commission requests briefing from the parties on certain issues under review, as indicated in this notice. The Commission also requests briefing from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Ronald A. Traud, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3427. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on May 19, 2021, based on a complaint filed by DISH DBS Corporation of Englewood, Colorado; DISH Technologies,

L.L.C., of Englewood, Colorado; and Sling TV L.L.C., of Englewood, Colorado (collectively, “DISH”). 86 FR 27106–07 (May 19, 2021). The complaint alleged a violation of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain fitness devices, streaming components thereof, and systems containing same by reason of infringement of certain claims of U.S. Patent Nos. 9,407,564 (“the ’564 patent”); 10,469,554 (“the ’554 patent”); 10,469,555 (“the ’555 patent”); 10,757,156 (“the ’156 patent”); and 10,951,680 (“the ’680 patent”). *Id.* at 27106. The notice of investigation named as respondents ICON Health & Fitness, Inc. of Logan, Utah (“ICON” or “iFIT Inc.”); FreeMotion Fitness, Inc. of Logan, Utah (“FreeMotion”); NordicTrack Inc. of Logan, Utah (“NordicTrack,” and with ICON and FreeMotion, “iFit”); lululemon athletica inc., of Vancouver, Canada (“lululemon”); Curiouser Products Inc. d/b/a MIRROR of New York, New York (together with lululemon, “MIRROR”); and Peloton Interactive, Inc. of New York, New York (“Peloton,” and with the other respondents, “Respondents”). *Id.*; Order No. 14 (Nov. 4, 2021), *unreviewed by* Comm’n Notice (Dec. 6, 2021), 86 FR 70532 (Dec. 10, 2021). The Commission’s Office of Unfair Import Investigations (“OUII”) also was named as a party in this investigation. 86 FR at 27106.

Prior to the issuance of the Final ID, the complaint and notice of investigation were amended to change the name of ICON to iFIT Inc. Order No. 14 (Nov. 4, 2021), *unreviewed by* Comm’n Notice (Dec. 6, 2021), 86 FR at 70532. The investigation was also terminated in part as to claims 6, 11, and 12 of the ’156 patent, claim 22 of the ’554 patent, and claim 17 of the ’555 patent. Order No. 15 (Nov. 19, 2021), *unreviewed by* Comm’n Notice (Dec. 20, 2021). Moreover, claims 9 and 12 of the ’156 patent, claim 19 of the ’554 patent, claims 12 and 13 of the ’555 patent, and claim 6 of the ’564 patent are no longer asserted against iFit and Peloton. *Id.* The investigation was further terminated as to claims 6–8, 10, and 13–15 of the ’564 patent, claims 3 and 6–12 of the ’156 patent, claims 18, 19, 21–25, and 30 of the ’554 patent, claims 12, 13, 16, 17, 26, and 27 of the ’555 patent, and all asserted claims of the ’680 patent. Order No. 21

(Mar. 3, 2022), *unreviewed by Comm’n Notice* (Mar. 23, 2022).

At the time of the Final ID, DISH asserted the following claims against MIRROR and iFit: claims 1, 3, and 5 of the ’564 patent; claims 16, 17 and 20 of the ’554 patent; claims 10, 11, 14, and 15 of the ’555 patent; and claims 1, 4, and 5 of the ’156 patent. DISH also asserted the following claims against Peloton: claims 1 and 3–5 of the ’564 patent; claims 16, 17, and 20 of the ’554 patent; claims 10, 11, 14, and 15 of the ’555 patent; and claims 1, 2, 4, and 5 of the ’156 patent.

On September 9, 2022, the CALJ issued the Final ID, which found that Respondents violated section 337.

The CALJ’s recommendation on remedy and bonding (the “RD”) recommended that, if the Commission finds a violation of section 337, the Commission should issue a limited exclusion order and a cease and desist order directed to each of the Respondents. The RD further recommended that the Commission impose a zero percent (0%) bond during the period of Presidential Review. The Commission did not direct the CALJ to make findings and a recommendation on the statutory public interest factors.

On September 23, 2022, Respondents and OUII filed petitions for review of the Final ID. On October 3, 2022, DISH and OUII filed responses to the petitions.

On October 11, 2022, DISH and Respondents filed their public interest comments pursuant to Commission Rule 210.50(a)(4) (19 CFR 210.50(a)(4)).

Having examined the record in this investigation, including the Final ID, the petitions for review, and the responses thereto, the Commission has determined to review the Final ID in part. In particular, the Commission has determined to review the following:

- (1) whether DISH satisfied the technical prong of the domestic industry requirement as to all Asserted Patents;
- (2) whether claims 16, 17, and 20 of the ’554 patent and claims 14 and 15 of the ’555 patent are entitled to claim priority to U.S. App. No. 60/566,831;

- (3) whether claims 16, 17, and 20 of the '554 patent and claims 14 and 15 of the '555 patent are invalid as anticipated over the prior public use of the Move Media Player;
- (4) whether the asserted claims of the '555 patent are invalid for misjoinder of Mr. Brueck; and
- (5) whether the preamble of claim 10 of the '555 patent is limiting.

The parties are requested to brief their positions with reference to the applicable law and the evidentiary record regarding the questions provided below:

- (1) Regarding whether DISH satisfied the technical prong of the domestic industry requirement as to all Asserted Patents, if the Commission determines that DISH's theory that the technical prong of the domestic industry requirement can be satisfied by the combination of its contended domestic industry products and third-party video displays (whether that combination is assembled by DISH itself or by its customers) was barred by Order No. 22 (Mar. 8, 2022):

- (A) Has DISH failed to prove a violation of section 337?

- (B) What is the scope and extent of factfinding that would be required for the Commission to determine whether DISH satisfied the technical prong of the domestic industry requirement?

- (C) Should the Commission remand to the CALJ for further claim construction regarding whether the "presenting" and "providing"/"provide" claim limitations require a display (*see* Final ID at 109 n.18)?

- (2) If the Commission determines that the final ID did not make a finding as to whether Mr. Brueck is misjoined on the '555 patent:

(A) What is the scope and extent of factfinding that would be required for the Commission to determine whether Mr. Brueck is misjoined on the '555 patent?

(B) Should the Commission remand to the CALJ for resolving this issue? And, if so, what should the scope of remand include?

The parties are invited to brief only these discrete questions. The parties are not to brief other issues on review, which are adequately presented in the parties' existing filings.

In connection with the final disposition of this investigation, the statute authorizes issuance of, *inter alia*, (1) an exclusion order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) cease and desist orders that could result in the respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or are likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 7–10 (Dec. 1994).

The statute requires the Commission to consider the effects of that remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on: (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation. In particular, the

Commission requests that the parties respond to the statements on the public interest submitted by the parties.

In addition, the Commission requests specific briefing to address the following questions relevant to the public interest considerations in this investigation, including evidence in support:

- 1) Would an exclusion order or cease and desist order affect existing owners of Accused Products, and if so, how?
- 2) To what extent and as to which statutory public interest factor(s) should the Commission consider that DISH does not compete with Respondents in the sale of internet-streaming enabled fitness devices?
- 3) Please discuss what alternatives, if any, to the Accused Products would be available to U.S. consumers, including from third parties, if the Commission were to issue remedial orders. Please discuss price point, functionality, and/or any other information that the parties believe would be useful to the Commission in evaluating the availability of alternative fitness devices.
- 4) Please explain whether an exclusion order or cease and desist order would impact domestic production of like or directly competitive products.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve, disapprove, or take no action on the Commission's determination. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the questions identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions

on the issues of remedy, the public interest, and bonding. Such initial written submissions should include views on the RD that issued on September 9, 2022.

Initial written submissions, limited to 60 pages, must be filed no later than the close of business on December 2, 2022. Complainants are requested to identify the form of the remedy sought and Complainants and OUII are requested to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the HTSUS subheadings under which the accused articles are imported, and to supply identification information for all known importers of the accused products. Reply submissions, limited to 20 pages, must be filed no later than the close of business on December 9, 2022. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (Mar. 19, 2020). Submissions should refer to the investigation number ("Inv. No. 337-TA-1265") in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf*). Persons with questions regarding filing should contact the Secretary at (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) by the

Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

The Commission vote for this determination took place on November 18, 2022.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

Issued: November 18, 2022.

Katherine Hiner,

Acting Secretary to the Commission.

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